

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED

APR - 3 1998

DOCKET FILE COPY ORIGINAL
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Computer III Further Remand)	CC Docket No. 95-20
Proceedings: Bell Operating Company)	
Provision of Enhanced Services)	
)	
1998 Biennial Regulatory Review -)	CC Docket No. 98-10
Review of Computer III and ONA)	
Safeguards and Requirements)	

COMMENTS OF THE
ASSOCIATION OF TELESERVICES INTERNATIONAL, INC.

ASSOCIATION OF TELESERVICES
INTERNATIONAL, INC. (ATSI)

Frank Moore
Smith, Bucklin & Associates, Inc.
Government Affairs Division
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 429-5100

Its Regulatory Counsel

Herta Tucker
Executive Vice President
Association of TeleServices International, Inc.
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 429-5151

April 3, 1998

TABLE OF CONTENTS

SUMMARY	i
I. STATEMENT OF INTEREST	1
II. BACKGROUND	3
III. RESPONSE TO FNPRM	5
A. THE COMMISSION'S PUBLIC POLICY GOALS ARE NOT SUPPORTED BY ITS TENTATIVE CONCLUSIONS	5
B. STRUCTURAL SAFEGUARDS CONTINUE TO BE JUSTIFIED	10
1. Competition Will Not Replace Safeguards Against Discriminatory Practices	10
2. Structural Separation Will Create Incentives For BOC Innovation Both In The Administration Of Affiliates And In The Deployment of Services	12
3. A Single Model For Structural Separation Must Include Safeguards To Address The Relationship Between The BOCs And Enhanced Service Providers	15
C. ONA UNBUNDLING GOALS ARE FUNDAMENTAL TO NETWORK ACCESS EQUALITY	18
1. Section 251-Type Unbundling Should Be Made Available Immediately To Enhanced And Information Service Providers	18
2. Section 251-Driven Competition Will Not Eliminate The Need To Guard Against Access Discrimination	20
3. Not All Enhanced And Information Service Providers Are Alike	22
D. COMPETITION IN THE LOCAL EXCHANGE MARKET SHOULD NOT BE RELIED UPON TO RELAX OR REPLACE SAFEGUARDS	23
1. Entities In Control Of The Network Cannot Be Relied Upon To Create A Level Playing Field For Their Competitors	23

2.	The Test Of True Competition Is The Enthusiastic And Aggressive Effort To Develop Business Relationships And To Accommodate The Essential Needs Of The Customer	24
E.	CEI PLANS AND CERTAIN REPORTING REQUIREMENTS CONTINUE TO SERVE AN IMPORTANT PURPOSE AND IN NO WAY INTERFERE WITH THE INNOVATIVE CAPABILITIES OF THE BOCS	28
1.	CEI Serves As An Important Safeguard Against Network Access Inequality	28
2.	Reporting Requirements May Be Consolidated, But Information Reported Must Not Be Eliminated	31
F.	NETWORK ACCESS REQUEST PROCEDURES SHOULD CREATE OPPORTUNITIES FOR PRO-COMPETITIVE OUTCOMES	33
IV.	CONCLUSION	35

SUMMARY

ATSI continues to support the application of structural safeguards to the provision of BOC enhanced services. Absent implementation of ONA as originally conceived, including fundamental network unbundling, the *Computer III* nonstructural safeguards are inadequate to prevent access discrimination and other competitive abuses by the BOCs against their enhanced service competitors.

In these comments, ATSI argues that neither the 1996 Act nor other market conditions justify the continued application of nonstructural safeguards to the BOCs' provision of intraLATA information services. ATSI also argues that the separate affiliates provisions of the 1996 Act provide an opportunity to establish a single regime appropriate for both interLATA and intraLATA information services.

ATSI argues that the Commission must retain existing safeguards under the *Computer III* and ONA regimes. Because ONA has not been deployed to the fundamental levels that will allow ESPs to pick and choose the network functions and features required without time delays and inevitable denials, CEI plans continue to provide important information for the Commission's oversight responsibilities. For similar reasons, ATSI argues that the information required in the ONA reports, nondiscrimination reports and network information disclosure rules must be retained. While it is legitimate for the Commission to seek ways to eliminate duplicity created by Act-mandated reporting requirements and to otherwise streamline all

reporting requirements, the competitive advantages enjoyed by the BOCs by virtue of their control over the telephone network has not changed; therefore, the information reported under current rules should not be eliminated.

ATSI argues that section 251-type unbundling should be made available immediately to ESPs. This is consistent with the goals of ONA and is necessary to ensure that ESPs have access to all functions and features that are now available. ATSI disagrees with the market analysis offered by the Commission and its vision of a local exchange market where both the BOCs and other carriers will seek out the network access business of ESPs. In order to ensure ESP access to section 251-type unbundling, the Commission must make such access directly available to ESPs.

ATSI strongly disagrees with the Commission's reliance on competition to replace safeguards and the Commission's unwarranted concern for the BOCs' ability to use the network in innovative ways. The Commission argues that competition between the BOCs and other telecommunications carriers entering local exchange markets through the mechanisms of the 1996 Act will now serve as adequate safeguards for the ESPs. At the same time, according to the Commission, the BOCs require immediate assistance through reduction of nonstructural safeguards to offer innovative services to the public. ATSI argues that neither the BOCs nor other telecommunications carriers should be expected to market network functions and features to ESPs who compete with them in the provision of enhanced and information services. Based on common sense applications of competition-driven marketplace behavior, these entities cannot compete both for the network access business of ESPs and at the same time against ESPs

through the provision of their own enhanced services.

Finally, ATSI disagrees with the Commission's statement that at some point in the future competition will eliminate the need for all safeguards. It goes against the logic of competitive impulses to expect the BOCs who control the very means of competition to provide network access equality to their competitors in the enhanced services market.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Computer III Further Remand)	CC Docket No. 95-20
Proceedings: Bell Operating Company)	
Provision of Enhanced Services)	
)	
1998 Biennial Regulatory Review -)	CC Docket No. 98-10
Review of Computer III and ONA)	
Safeguards and Requirements)	

**COMMENTS OF THE
ASSOCIATION OF TELESERVICES INTERNATIONAL, INC.**

The Association of TeleServices International (ATSI) respectfully submits its comments in the above captioned proceedings.¹

I. STATEMENT OF INTEREST

The Association of TeleServices International, formerly the Association of Telemessaging Services International, Inc., is the national trade association for the telephone services industry. Its members provide a wide variety of services, including live telephone answering services, automated voice storage and retrieval services and services that integrate operators and automated functions. There are approximately 3,000 telephone

¹ Further Notice of Proposed Rulemaking, FCC 98-8 (released January 30, 1998) (FNPRM).

messaging service bureaus (telemessagers) in the United States handling over one billion calls per year for more than 800,000 customers nationwide. Over ninety-five percent of the ATSI membership qualifies as small businesses and approximately sixty percent of the membership is represented by women owned and operated enterprises.

Because ATSI members remain dependant upon the BOCs for essential services, facilities, and interconnection to the local network, the Association has been an active participant in the *Computer III* proceedings. ATSI has also participated in the Information Industry Liaison Committee (IILC), now reorganized as the Network Interconnection Interoperability Forum (NIIF). Throughout *Computer III*, ATSI has expressed serious doubts that the Commission's nonstructural safeguards effectively prevent the BOCs from leveraging their monopoly control of the local exchange networks to impair competition in markets such as voice messaging services. The BOCs currently have no incentives to respond favorably to the requests of teleservice providers. Without mechanisms that prevent the opportunities of discriminatory behavior, the BOCs will continue to interfere with teleservice providers' access to and utilization of the telephone network.

II. BACKGROUND

In the first Notice of Proposed Rulemaking for this *Computer III* Further Remand proceeding,² ATSI argued that absent fundamental unbundling, only structural separation can effectively prevent access discrimination.³ ATSI argued that discrimination in network design and new service deployment is not addressed by the current CEI requirements, network information reporting requirements, or the IILC process. ATSI described how communication between a BOC's voice messaging operations and its basic telephone service prevented a newly deployed network capability from being offered to a teleservice provider who had repeatedly requested the same capability through the IILC.

ATSI also argued that structural separation would prevent the BOCs' regulated personnel from "unhooking" the customers of

² See *Computer III* Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, FCC 95-48 (released February 21, 1995). The Commission provides a full citation of the *Computer III* and ONA proceedings in the first and second footnotes of this FNPRM.

³ See Comments of the Association of Teleessaging Services International, Inc., CC Docket No. 95-20, filed April 7, 1995, pages 6 and 7 (*ATSI Computer III Further Remand Comments*).

competing teleservice providers who must request necessary regulated services from the BOCs. ATSI members continue to report instances in which existing customers have been solicited by the local BOC office when customers make requests for regulated services or when they are otherwise identified as customers of competing teleservice providers. When such abuses are detected, they are typically dismissed by the BOCs as mistakes, and teleservice providers are unable to justify the expense of pursuing available remedies. For the teleservicing business, however, these mistakes result in lost customers whose business cannot be recovered. The only acceptable remedy for this is the imposition of adequate structural safeguards. After the teleservice provider invests the time and expense of working with the prospective customer and making the sale, the BOC has what is essentially a free, last minute opportunity to make an unsolicited sales pitch for its own voice messaging services. ATSI is aware of a recent complaint filed with the Commission that illustrates this very type of behavior.

ATSI has long suspected that those instances actually detected represent a small portion of the abuses that actually occur. ATSI filed numerous examples of these discriminatory

practices in the *Computer III* Remand Proceeding.⁴ It is not enough to establish rules that prohibit the BOCs from engaging in this behavior. Effective safeguards must deny the BOCs with the opportunity of engaging in this behavior, something that nonstructural safeguards cannot accomplish. It is ATSI's position that the Telecommunications Act of 1996⁵ supports the imposition of structural safeguards and that no level or dimension of competition in the local exchange market will reduce or eliminate the need for structural safeguards.

III. RESPONSE TO THE FNPRM

A. THE COMMISSION'S PUBLIC POLICY GOALS ARE NOT SUPPORTED BY ITS TENTATIVE CONCLUSIONS.

The Commission reiterates three complementary goals said to have been a part of earlier *Computer III* and ONA proceedings.⁶

As its first goal, the Commission states that consumers and

⁴ See Comments of the Association of Teleessaging Services International, Inc., CC Docket No. 90-623, filed March 8, 1991 (Attachments) (*ATSI Computer III Remand Comments*).

⁵ Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. sections 151 et seq (1996 Act).

⁶ See *FNPRM* at paragraph 1.

communities should be enabled to take advantage of innovative "enhanced" or "information" services offered by both the BOCs and other enhanced service providers. Having said this, the Commission throughout this *FNPRM* focuses on ways to assist the BOCs' ability to offer innovative services and assumes that it is only through the final elimination of structural safeguards and the relaxation of *Computer III* and ONA safeguards that innovation will be made possible. The Commission states that without structural and other regulatory relief the BOCs will be restricted in the amount of innovative services that they will be able to offer to the public; however, the Commission provides no explanation of how such relief will in fact result in more innovation or what BOC innovation in the past has been forestalled.

ATSI argues that a relaxation of current safeguards will only exacerbate the difficulties that enhanced service providers like teleservice providers have in utilizing the telephone network in their own efforts to find innovative network applications and to offer new competitive services. ATSI urges the Commission to review its tentative conclusions and show an equal level of attention to the important role that ESPs play in providing innovative services to the public. ATSI also urges the Commission to allow the BOCs to make these arguments on their own

and provide evidence of innovative deployments delayed or services denied the public.

As its second goal, the Commission states that the continued competitiveness of the "already robust" information services market should be continued.

ATSI has consistently argued for a pro-competitive market where ESPs would have network access equality with the BOCs and where no one competitor would have an unfair advantage in marketing competitive services to the public.⁷ A pro-competitive market, however, will require safeguards that provide a level playing field for small and entrepreneurial ESPs to offer services in competition with the BOCs and prevent the BOCs from unhooking the competition's current customer base.

ATSI disagrees with the proposition that the information services market is so robust that safeguards may now or in the near future be relaxed. The competitive landscape between the BOCs and teleservice providers has not changed with the implementation of the 1996 Act. The BOCs continue to enjoy their control over essential network functions and features and to use this control both as a bottleneck to delay and deny access and as

⁷ Marketing advantages include the ability to both utilize network functions and features in support of enhanced services and to engage telecommunications consumers representing prospective customers more readily and at lower costs.

a net to steal hard-won and loyal customers from ESPs.

Furthermore, telemessagers do not have the economic resources to combat BOC discriminatory practices as the Commission suggests that certain ISP competitors will be able to do.⁸

As its third goal, the Commission states that safeguards for BOC provision of enhanced or information services should make common sense in light of current technological, market, and legal conditions.

The Commission would eliminate once and for all the hope of returning to the logic of structural separation and in return offers yet-to-materialize market perfections of "full competition" that in no real or theoretical construct would be able to serve as safeguards against behavior that is not easily detected and often results in business that is irretrievably lost.

The Commission also fails to consider what role technology, markets and legal conditions should play in creating incentives on the part of the BOCs to create efficiencies for the operations of separate affiliates and for meeting the requirements of the current *Computer III* and ONA regimes. Over time there should be opportunities to realize efficiencies due to the increased market

⁸ See *FNPRM* at paragraph 36.

opportunities for BOC information services. Therefore, the Commission should ask, before arriving at the tentative conclusions of this *FNPRM*, how technological advances and market economies will create internal efficiencies for the BOCs so that they might compete effectively through separate affiliates as well as within the current *Computer III* and *ONA* regimes.

In addition to these three goals, the Commission states that it seeks to strike a reasonable balance between its goal of reducing and eliminating regulatory requirements when appropriate, as competition supplants the need for such requirements to protect consumers and competition, and its recognition that until full competition is realized, certain safeguards may still be necessary.⁹

The Commission places far too much faith in both the market's ability to achieve "full competition" and the ability of competition to supplant basic safeguards. Competition alone is not capable of correcting the advantages enjoyed by the BOCs by virtue of their control over assets required by their competitors and their competitors' customers. Furthermore, the Commission seems unwilling to allow time to demonstrate whether in fact the 1996 Act will create the competitive landscape hoped for and

⁹ See *id.* at paragraph 7.

whether in fact the competition will create the market dynamics that the Commission argues should replace *Computer II*, *Computer III* and ONA safeguards.

The Commission should not retreat from its legitimate role of actively monitoring the BOCs' deployment and marketing of competitive services and the BOCs' treatment of ESPs whose own offerings require unimpeded access to the telephone network. Neither current market realities nor foreseeable developments in the market call for the retreat that the Commission proposes in this *FNPRM*. As long as the BOCs enjoy the control of the telephone network, as they do now and will for the foreseeable future, the Commission must resist replacing regulatory safeguards with unrealized market forces.

B. STRUCTURAL SAFEGUARDS CONTINUE TO BE JUSTIFIED.

1. Competition Will Not Replace Safeguards Against Discriminatory Practices.

ATSI objects to the Commission's tentative conclusion that the 1996 Act's overall pro-competitive, de-regulatory framework, as well as the Commission's public interest analysis, support the continued application of the Commission's nonstructural safeguards regime to BOC provision of intraLATA information

services.¹⁰

With this tentative conclusion, the Commission continues to make every effort to justify the elimination of structural safeguards. ATSI argues that structural separation continues to be justified in order to preserve a pro-competitive marketplace in which the BOCs own and control access to the very means of competition.

ATSI does not believe that achievement of the Act's most ambitious goals will alter in any appreciable way the market advantage that the BOCs continue to enjoy through their ownership and control of the telephone network. With its comments filed in *Computer III Remand*,¹¹ ATSI suggested a modified structural separation approach that would ameliorate the three most significant flaws in the nonstructural safeguards regime: joint marketing of basic and enhanced services, the CPNI double standard, and joint billing and collection.¹² ATSI also reiterated its arguments in favor of structural separation in

¹⁰ See *id.* at paragraph 48.

¹¹ *Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991).

¹² See *ATSI Computer III Remand Comments* at pages 22 through 24.

Computer III Further Remand.¹³ ATSI resubmits these arguments for the Commission's consideration in this proceeding.

2. Structural Separation Will Create Incentives For BOC Innovation Both In The Administration Of Affiliates And In The Deployment Of Services.

The Commission tentatively concludes that allowing the BOCs to offer intraLATA information services subject to nonstructural safeguards serves as an appropriate balance of (1) the need to provide incentives to the BOCs for the continued development of innovative new technologies and information services that will benefit the public with (2) the need to protect competing ISPs against the potential for anticompetitive behavior by the BOCs. The Commission therefore proposes to allow the BOCs to continue to provide intraLATA information services on an integrated basis, subject to the Commission's *Computer III* and ONA requirements.

The Commission has focused so long and hard on the costs of structural separation that it now makes arguments that the BOCs might otherwise be expected to make on their own behalf. The Commission argues that market forces now justify the death blow

¹³ See *ATSI Computer III Further Remand Comments* at pages 6 through 10.

to structural separation and the elimination of certain *Computer III* and *ONA* safeguards. Furthermore, the Commission fails to ask if the same market forces might not encourage a discipline on the part of the BOCs to create operational efficiencies that would eliminate the restrictions which the Commission now argues stifle the BOCs' ability to offer innovation in the information services markets. These same concerns were not so compelling as to prevent the Congress from imposing similar structural safeguards as a mechanism for creating a pro-competitive environment between the BOCs and other telecommunications carriers.¹⁴

Finally, the Commission fails to fully explain how the application of nonstructural safeguards and the BOCs' ability to offer information services on an integrated basis serve as incentives to the BOCs to develop innovative technologies and information services. Taken one step further, the Commission fails to demonstrate how the BOCs' ability to release their besieged innovative energies support the 1996 Act's pro-competition goals (particularly where these are defined by the Commission in this *FNPRM* as being contradictory to safeguards

¹⁴ ATSI therefore disagrees with the Commission's decision in this *FNPRM* not to place more appropriate significance on Congress's decision to impose structural separation in section 272 to the BOC provision of interLATA information services. See *FNPRM* at paragraphs 54 and 55.

once considered essential for the enhanced services market). In the same vein, the Commission fails to explain what incentives, if any, nonstructural safeguards give birth to in support of a pro-competition marketplace.

Notwithstanding its tentative conclusion, the Commission should consider the possibility that structural separation, which requires the BOCs to treat their own competitive arms in the same way that they treat ESP competitors, will provide both BOC affiliates and competing ESPs with the same opportunities to drive innovation and offer enhanced services that benefit the public. In a truly competitive market, the BOCs need not be singled out to carry the burden of offering the telecommunications consumer new and innovative services.¹⁵

The Commission should, therefore, focus on making the telephone network accessible to all potential users. This can best be done through the imposition of structural separation. Innovation will be driven by network access equality between the BOC affiliates and ESPs. The BOCs will utilize the telephone network in new and innovative ways based on a desire to develop

¹⁵ All providers of enhanced services, competing equally for the application of network functions and features, have a role to play in innovation. Structural separation, therefore, accomplishes the dual goal of (1) supporting a pro-competition marketplace where bottlenecks and traps are minimized and (2) freeing all innovative energies to compete for network applications desired by the telecommunications consumer.

information services that the telecommunications consumer prefers over those of their competitors. The individual desire of each competitor to utilize the network in offering enhanced or information services will drive innovation, and the more accessible the network is to competing enhanced and information services providers, the greater the incentive the BOCs will have to be innovative. Competition drives innovation; monopoly control over essential assets or public resources seeks to preserve itself.

3. A Single Model For Structural Separation Must Include Safeguards To Address The Relationship Between The BOCs And Enhanced Service Providers.

The Commission notes that the 1996 Act requires BOCs to provide certain interLATA information services through structurally separate affiliates, while the Act does not require BOCs to offer intraLATA information services through a separate affiliate.¹⁶ The Commission also recognizes that the Act-mandated separate affiliate requirements will reduce the cost of returning to a structural safeguards regime for BOC provision of intraLATA information services since the BOCs will be required to establish at least one structurally separate

¹⁶ See FNPRM at paragraph 53.

affiliate in order to provide services covered by sections 272 and 274.¹⁷

ATSI encourages the Commission to explore the development of a single separate affiliate regime that includes safeguards intended to address the specific concerns of both *Computer II* and the 1996 Act. The simplicity of such a regime offers efficiencies for the BOCs, BOC competitors, and the Commission. ATSI agrees that it would be in the public interest to establish a single, uniform set of regulations for BOC provision of both intraLATA and interLATA information services. In structuring such an affiliate, however, the Commission should not overlook any unique aspects of the relationship between the BOCs and the ESPs that are not present in the competitive relationship between the BOCs and the telecommunications carriers. In the case of the voice messaging market, there is a significant disparity between the BOCs and teleservice providers in terms of size and economic prowess. The Congress's imposition of structural separation requirements is also instructive. The Congress recognized that the BOCs must be given an incentive to play fairly. If structural separation is deemed necessary to create a level playing field for telecommunications carriers competing against

¹⁷ See *id.* at paragraph 55.

the BOCs, it should be equally appropriate as a way to create a level playing field for enhanced service providers competing against the BOCs.

Furthermore, a single separate affiliate regime would eliminate the need to distinguish between intraLATA and interLATA information services for purposes of regulation. This should lower compliance and enforcement costs. For this reason, ATSI argues that the Commission should also apply ONA requirements to BOC provision of interLATA information services. The Commission has noted that ONA serves the public interest, not only by safeguarding against anticompetitive behavior on the part of the BOCs, but also by promoting the efficient use of the telephone network by ESPs.¹⁸

The Commission should also consider the efficiencies achieved for the BOCs resulting from the elimination of the incentive to separate intraLATA information services from interLATA information services. BOCs may choose to separate their intraLATA offerings from their interLATA offerings based purely on the desire to retain intraLATA market advantages.

ATSI also urges the Commission not to assume that the timetable that sunsets the Act-mandated structural separation

¹⁸ See *id.* at paragraph 98.

will be an appropriate measure for eliminating intraLATA separation requirements. Nevertheless, to the extent that the Commission continues to consider the entrance of telecommunications carriers as a pro-competitive force that will favor ESPs seeking access to the network, the BOCs' ability to transition from structural separation to a nonstructural regime should be triggered only after this competitive landscape is achieved. This would bring some parity between the arrival of competition in the local exchange markets via Act-mandated mechanisms and the tentative conclusions offered in this *FNPRM* that competition justifies a nonstructural safeguards regime. If competition is to serve some role as a new safeguard in the information services market, the Act-mandated safeguards intended to usher in such competition should first be allowed to work.

C. ONA UNBUNDLING IS FUNDAMENTAL TO NETWORK ACCESS EQUALITY

1. Section 251-Type Unbundling Should Be Made Available Immediately To Enhanced And Information Service Providers.

Enactment and implementation of the 1996 Act, as well as other developments, do not alleviate the Ninth Circuit's concern

about the level of unbundling mandated by ONA.¹⁹

The Ninth Circuit rightly expressed concern about the way in which the Commission scaled back the fundamental unbundling requirements of ONA while lifting structural separation for the BOCs. The Court noted that this was inconsistent with the Commission's earlier position that regarded fundamental unbundling of the telephone network as an essential safeguard from access discrimination against ESPs.²⁰ The Commission, with its conclusions in this *FNPRM*, does nothing to address or justify this departure from its earliest vision of ONA and, therefore, does nothing to alleviate the Ninth Circuit's concerns.

The Commission should not retreat from the goal of fundamental unbundling or the requirement that unbundling be driven by the innovative uses of the telephone network by ESPs. ATSI argues that competition for the functions and features within a regime of network access equality will drive ONA deployment to the benefit of the BOCs, enhanced and information service providers, and the telecommunications consumer.

The Commission states that the unbundling requirements imposed by section 251 and the Commission's implementing

¹⁹ See *id.* at paragraphs 29 through 36.

²⁰ See *California v. FCC*, 39 F.3d 919, at 929 and 930 (9th Cir. 1994) (*California III*).